

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

JANET KAY MURRAY,

Debtor.

No. 00-21318

Chapter 7

ALPHA FINANCIAL
SERVICES, INC.,

Plaintiff,

vs.

Adv. Pro. No. 00-2060

JANET KAY MURRAY
a/k/a JANET MURRAY
a/k/a JANET W. MURRAY,

Defendant.

M E M O R A N D U M

APPEARANCES :

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding, the plaintiff, Alpha Financial Services, Inc., seeks a determination of nondischargeability pursuant to 11 U.S.C. § 523(a)(4) and (6). Presently before the court is the debtor's motion to dismiss for lack of jurisdiction because the agreed order extending the dischargeability deadline under Fed. R. Bankr. P. 4007(c) was not entered until after the bar date. For the reasons discussed below, the motion will be denied. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(I).

I.

The debtor, Janet Kay Murray, commenced the bankruptcy case underlying this proceeding by the filing of a voluntary chapter 7 petition on May 22, 2000. A meeting of creditors was set for June 28, 2000, and pursuant to Fed. R. Bankr. P. 4007(c), the deadline to file a complaint objecting to dischargeability of certain debts was August 28, 2000. On August 29, 2000, an agreed order approved for entry by counsel for both the plaintiff and the debtor was entered extending the dischargeability deadline from August 28 to October 12, 2000. Similarly, on October 13, 2000, an agreed order was entered which further extended the dischargeability deadline from October 12 to October 26, 2000. A third agreed order was then

entered on October 26, 2000, extending the deadline to November 16, 2000.

On November 16, 2000, the plaintiff commenced the instant dischargeability proceeding. In response, the debtor filed on December 7, 2000, the motion to dismiss which is presently before the court. In the motion, counsel for the debtor admits her agreement to the entry of the three agreed orders extending the dischargeability deadline. She states, however, that "[u]pon examination of the entry of the [agreed] Orders, counsel for Defendant discovered that the time for filing objections expired on October 12, 2000 without entry of either a Motion or an Order prior to the expiration as required by Bankruptcy Rule 4004(b)[sic]." Citing this court's opinion in *Fugate v. Pack* (*In re Pack*), 252 B.R. 701 (Bankr. E.D. Tenn. 2000), as dispositive, the debtor requests that the court "dismiss this complaint for lack of jurisdiction pursuant to FRCP 12(b)."

In response to the motion to dismiss, the plaintiff denies that the agreed orders were untimely, argues that the *Pack* decision is inapposite to the present case, and asserts that the debtor is estopped from alleging any untimeliness due to her attorney's approval of the agreed orders. The response is supported by the affidavits of plaintiff's counsel, John S. Taylor, and his legal secretary, Sherry Bunn. Ms. Bunn states

in her affidavit that on October 11, 2000, at the direction of Mr. Taylor, she shipped the Agreed Order Extending Time plus a cover letter via United Postal Service ("UPS") Next Day Air to the bankruptcy clerk in Greeneville, Tennessee. Ms. Bunn also states that the next morning, at 8:50 a.m., she telephoned the bankruptcy clerk and left a voice mail message, "inquiring whether the aforementioned UPS package had been received. At 9:01 a.m. I talked with 'Janet' who said she would 'let me know when they had received the package and the Judge had signed it.' Later that morning, I again talked with Janet who said, 'the Judge has signed the Order and everything is ok.'" Ms. Bunn states in her affidavit that "all of the dates, times and discussions are taken from contemporaneous notes that I took at the time of the conversations." Attached to the affidavit is a Fax Header and Response from UPS which indicates that the package containing the agreed order and cover letter was delivered to the bankruptcy clerk at 9:42 a.m. on October 12, 2000.

II.

Fed. R. Bankr. P. 4007(c) provides in pertinent part the following:

A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60

days after the first date set for the meeting of creditors under 341(a).... On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

In the adversary proceeding *Fugate v. Pack*, the trustee filed a complaint objecting to the debtors' discharge one business day after the time provided by Fed. R. Bankr. P. 4004(a) had expired. The trustee requested that the complaint be considered timely filed pursuant to the court's 11 U.S.C. § 105(a) powers because the complaint was mailed in sufficient time to have reached the clerk's office prior to the deadline. In ruling on the request, the court found it unnecessary to resolve the issue of whether the Rule 4004(a) deadline was a jurisdictional requirement or simply a statute of limitations, which is subject to waiver, estoppel, or equitably tolling, since the court concluded that equitable tolling was not warranted by the facts of the case. *In re Pack*, 252 B.R. at 706.

It was also noted in *Pack* that "as a general rule, this court has no authority to extend the time to file discharge complaints after the time for doing so has expired even if the failure to file within the prescribed time was the result of excusable neglect." *Id.* at 705. The court further observed that under Rule 4004(b), the sixty-day deadline may be extended

upon motion, "if such a motion is filed before the sixty days has run" and that most courts have concluded that they lack the discretion to extend the deadline when the motion is made after the bar date. *Id.* In light of the fact that the trustee's motion for an extension was filed after the deadline and the conclusion that an equitable basis to extend the deadline had not been established, this court dismissed the objection to discharge complaint in *Pack*. Thus, notwithstanding the debtor's assertion in this proceeding that *Fugate v. Pack* serves as authority for dismissal due to lack of jurisdiction, the *Pack* decision does not stand for the proposition that either the Rule 4004(a) deadline or the analogous Rule 4007(c) deadline is a jurisdictional prerequisite.

On the other hand, the *Pack* decision does support the debtor's contention that a court may not enlarge the time to file a discharge or dischargeability complaint under Rules 4004(b) and 4007(c) upon a motion filed after the deadline has passed. As such, the debtor argues that because the bar date in this case expired "without entry of either a Motion or an Order prior to the expiration," the complaint must be dismissed regardless of counsel's diligence in ensuring the court's timely receipt of the agreed order. The debtor further asserts that the receipt of the agreed order by the clerk was ineffective to

extend the deadline because Fed. R. Bankr. P. 9021 provides that "a judgment is effective only after entry."

As set forth in Ms. Bunn's affidavit with respect to the October 12, 2000 deadline, the court file does reflect that in both instances where the agreed orders were entered after expiration of the deadline, the proposed agreed orders along with the cover letters from plaintiff's counsel requesting their entry were received by the clerk of the court prior to expiration of the deadlines. The August 29, 2000 agreed order extending the August 28 deadline and cover letter were received on August 28, 2000, and the October 13, 2000 agreed order which extended the October 12 deadline along with its cover letter were received on October 12, 2000. The court file also reflects that the agreed orders were actually signed by the court on the day of each respective deadline, August 28 and October 12, but neither were entered and docketed by the clerk of the court until the following day.

The court concludes that the cover letters accompanying the agreed orders which were received by the clerk of the court prior to the expiration of the deadlines meet Fed. R. Bankr. P. 4007(c)'s requirement of a motion. The cover letter received August 28 stated:

Enclosed please find an Agreed Order Extending Time
to File Complaint to Determine Dischargeability of

Debt. If acceptable, I would appreciate you presenting to Judge Parsons for signature and entry, returning to me a time stamped copy of the Order.

I would appreciate you doing this NOW inasmuch as the original deadline for filing complaints is August 28, 2000. [Emphasis in original.]

The letter was signed by Mr. Taylor and indicated that a copy was served upon debtor's counsel. Similarly, the letter to the clerk of the court received on October 12 stated:

Enclosed please find an Agreed Order Extending Time to File Complaint to Determine Dischargeability of Debt which, if acceptable, I would appreciate you presenting to Judge Parsons for signature and entry by October 12, 2000, which is the deadline we are seeking to have extended.

If there are any questions, please let me know.

That letter was likewise signed by Mr. Taylor and evidenced that a copy was sent to debtor's counsel.

Fed. R. Bankr. P. 9013, which is entitled "Motions: Form and Service" provides as follows:

A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion other than one which may be considered ex parte shall be served by the moving party on the trustee or debtor in possession and on those entities specified by these rules or, if service is not required or the entities to be served are not specified by these rules, the moving party shall serve the entities the court directs.

The treatise COLLIER ON BANKRUPTCY notes that it is a "motion's substance, and not merely its linguistic form, that determines

its nature and legal effect." 10 COLLIER ON BANKRUPTCY ¶ 9013.03 (15th ed. rev. 2000). The letters from plaintiff's counsel which accompanied the agreed orders satisfy Rule 9013's requirement that a motion set forth the relief sought as both letters requested entry of the agreed orders extending the dischargeability deadline. Although the letters arguably may have failed to set forth with particularity the grounds for the request, such a defect is not fatal "where the opposing party knew or had notice of the particular grounds being relied upon." *Id.* In this regard, knowledge on behalf of the debtor and her counsel is presumed since agreements had already been reached concerning the extensions. Finally, both letters evidence service by plaintiff's counsel upon counsel for the debtor.

The fact that the letters were not entitled "motions" and captioned accordingly is of little significance. In the case of *In re Mancini*, 1986 WL 28905 (Bankr. S.D.N.Y. 1986), the bankruptcy court considered the issue of whether an "application" met the motion requirement of Rule 4007(c), noting that "[t]here is little guidance in the Bankruptcy Rules regarding the formal requirements of a motion." *Id.* at *3. The court observed that Fed. R. Bankr. P. 9013 is "derived from"

Fed. R. Civ. P. 5(a)¹ and 7(b)(1)² and that the courts have generally given a flexible interpretation to the form requirements of Fed. R. Civ. P. 7(b). *Id.* (citing 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 7.05 (2d ed. 1985)) ("Although Rule 7(b)(1) provides that 'an application to the court for an order shall be by motion,' that motion need not be formally

¹Rule 5(a) provides:

Service: When required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4. In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

²Rule 7(b)(1) provides:

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

presented.").

After reviewing decisions by courts construing both Fed. R. Bankr. P. 9013 and Fed. R. Civ. P. 7(b), the *Mancini* court rejected "a formalistic method of determining a document's compliance with the Bankruptcy Rules solely by the name given it by its maker." *Id.* at *5. Accordingly, the court concluded that the documents submitted constituted a motion as required by Rule 4007(c). *Id.* See also *Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir. 1978)(affidavit filed to obtain order disqualifying judge satisfied Fed. R. Civ. P. 7(b) requirements which were intended "to give a simple and elastic procedure without too much emphasis on form"; the "failure to type in the word 'motion' above the word 'affidavit' in no way detract[ed] from the notice which the affidavit gave of the nature of the application"); *Bumpus v. Uniroyal Tire Co.*, 392 F. Supp. 1405, 1406 (E.D. Penn. 1975) (district court treated letter from plaintiff's counsel as a motion for new trial, concluding that the letter was sufficient in form to constitute a motion under Fed. R. Civ. P. 7(b) because it questioned the qualifications of one of the impaneled jurors and requested a new trial if the court should determine that the juror was not qualified); *In re Arkin-Medo, Inc.* 44 B.R. 138, 139 (Bankr. S.D.N.Y. 1984) (paper styled as "Application for Order" which requested a Rule 2004 examination

constituted a motion because requirements of Rule 9013 were met in form). *Cf. Sea Harvest Corp. v. Riviera Land Co.*, 868 F.2d 1077, 1079 (9th Cir. 1989) (documents entitled "Affirmation and Assumption of Executory Contracts" filed by debtors did not constitute motions because they simply informed the court of the debtors' intentions without moving the court to do anything).

In the present case, it is clear from an examination of the letters from plaintiff's counsel that plaintiff was requesting extensions of the dischargeability deadline. Furthermore, it is uncontroverted that these requests were made to the court and that opposing counsel had knowledge of the requests prior to expiration of the deadline. As such, the letters constituted timely motions. To hold otherwise would unjustly elevate form over substance contrary to the intent and spirit of the rules of procedure. The court having concluded that the letters accompanying the proposed agreed orders constituted motions which were filed³ prior to the expiration of the Rule 4007(c) deadline,⁴ the debtor's motion to dismiss will be denied.⁵ An

³A document is filed when it is delivered and received into the custody of the clerk. *In re Pack*, 252 B.R. at 704.

⁴It should be noted that Fed. R. Bankr. P. 4007(c) only requires that the motion for an extension of time be filed prior to the deadline. There is no corollary requirement that an order granting the motion be entered before expiration of the deadline. *See Rogers v. Laurain (In re Laurain)*, 113 F.3d 595, (continued...)

order will be entered in accordance with this memorandum.

FILED: January 5, 2001

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

⁴(...continued)
598 (6th Cir. 1997)(contrasting bankruptcy rules that provide only that the motion be filed within the prescribed time period such as Fed. R. Bankr. P. 4004(b) and 4007(c) with rules like Fed. R. Bankr. P. 1017(e)(1) and 4003(b) that state the court must act within the prescribed time period).

⁵As a result, it is unnecessary for this court to determine whether the deadline is a jurisdictional requirement or simply a statute of limitations, which was waived by debtor's counsel's approval of the agreed orders.